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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 334

NINA DYE WORKS CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. A. 141a-144a),[1] is reported at 203 F. 2d 849.[2] The findings

[1] The designations "B.A." and "R.A." refer, respectively, to the appendix to the Board's brief and the appendix to the petitioner's (respondent below) brief in the court below, which together with the previous proceedings in this Court and the court below comprise the record here.

[2] In an earlier opinion (R.A. 118a-123a), reported at 198 F. 2d 362, the court below dismissed the Board's petition for enforcement of its order because of the charging party's noncompliance with the filing requirements of Section 9(f), (g) and (h) of the National Labor Relations Act prior to the filing of the charge, although it was in compliance prior to the issuance of the complaint. Subsequently this Court, on the authority of *National Labor Relations Board* v. *Dant*, 344 U.S. 375, reversed that ruling. 344 U.S. 924.

of fact, conclusions of law, and order of the Board (B. A. 216a-227a) are reported at 95 NLRB 824.

JURISDICTION

The decree of the court below was entered on June 22, 1953. The petition for a writ of certiorari was filed on September 19, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 13-15.

QUESTIONS PRESENTED

1. Whether the court below properly concluded that the Board's findings of fact were supported by substantial evidence on the record considered as a whole.

2. Whether an unfair labor practice charge averring in relevant part that petitioner had violated Section 8(a)(1) of the Act by "other acts and conduct", in addition to specified conduct, is sufficient to support the complaint issued by the Board's General Counsel particularizing the "other acts and conduct" averred in the charge.

3. Whether petitioner, in permitting and encouraging the circulation of an anti-union petition in order to ascertain the employees' attitude towards the Union, in a context of threats to discharge employees for failing to sign it and other coercive conduct, exceeded the permissible limits of privi-

leged speech under Section 8(c) of the Act and committed a violation of Section 8(a)(1).[3]

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board found and the court below agreed that petitioner had violated Section 8(a)(1) of the Act by various anti-union acts and statements and Section 8(a)(3) and (1) by discharging two employees because of their advocacy in support of a labor organization seeking to organize petitioner's employees.

A. *The facts as found by the Board*—Shortly before June 15, 1949, the Textile Workers Union of America, CIO, herein referred to as the Union, issued a press release announcing the start of its organizational drive at petitioner's plant. The release appeared in the June 15 edition of the York, Pennsylvania, "Gazette and Daily" (B.A. 161a; 52a, 143a-145a). Several employees on the night shift were opposed to the Union and decided to prepare a reply to the Union's press release (B.A. 171a-172a; 60a-61a, 101a-102a, 113a-114a). A letter prepared by employee Carl Miller on June 26, 1949, stated that the subscribers thereto disagreed with assertions by the Union that petitioner's employees were overworked and underpaid, that they

[3] Question No. 3 of the petition (Pet. 3, 20), whether the Board may, in view of Section 10(c) of the Act, order the reinstatement of employees discharged in part for cause and in part for discriminatory reasons is not presented here. The Board found (B.A. 218a-220a), and the court below approved the finding (R.A. 145a), that petitioner discharged the two employees in question solely because of their advocacy of the Union.

voluntarily chose to work overtime to increase their take-home pay, and that they preferred to deal individually with petitioner rather than through the Union (B.A. 163a, 172a; 103a-104a, 152a-154a). This letter was then circulated among the night shift employees (B.A. 172a; 110a).

The next morning, employee Garman handed the letter or petition to Foreman Royce and requested Royce to turn it over to an employee on the day shift (B.A. 173a; 116a). Royce gave the letter to employee Arthur Tate with instructions to "take it around the plant. . . . Read it and sign it." (B.A. 173a; 43a, 46a, 116a-117a.) In soliciting signatures to the petition, Tate found a number of employees reluctant to sign it unless they were assured that it had the approval of petitioner's president, Arthur Rhodes (B.A. 173a; 45a, 51a, 55a, 125a, 126a). When so advised by Tate, Rhodes said he had no objection to the circulation of the petition because he wanted to know how the employees felt about the Union (B.A. 174a; 45a). Thereafter, when two employees refused to sign the anti-union letter, they were threatened with discharge by their foreman, Harry Darrah (B.A. 175a; 49a, 55a, 56a-58a, 63a-65a).

Sometime thereafter, during the summer of 1949, petitioner's treasurer, Sam Fire, warned a group of employees who had been discussing the Union that "if the union comes in, we will move out" (B.A. 176a; 66a-67a, 69a).

In September 1949, President Rhodes summoned employee Fauth into his office and asked him what

he thought about the Union. When Fauth replied that he had not made up his mind (B.A. 177a; 67a-68a, 70a), Rhodes "guaranteed" that "if the Union would come in * * * we wouldn't see Sam Fire or Arthur Rhodes around, that they would sell out or move out." (B.A. 177a, 67a-68a.)

On June 15, 1949, the day the Union's announcement appeared in the "Gazette," employee Arthur Tate advised Foreman Royce that employees Ralph Ruby and Charles Miller favored the Union's plan to organize the plant. Royce then stated, "Well, I will see that they don't last long." (B.A. 218a, 167a; 39a, 41a, 42a, 43a, 116a.) Later that day, about a half hour before the day shift ended at 7 p.m., Royce discharged Ruby, saying "the boss said your work is unsatisfactory," and a few minutes later discharged Miller because "the big boy told me to lay you off" (B.A. 168a; 81a, 94a). As Ruby and Miller walked out of the plant, Royce remarked to them that he was sorry to see them go because they had been satisfactory employees, but that he (Royce) was unable to keep them on the job because he was only a minor boss (B.A. 169a, 83a, 95a).

At the hearing before the Trial Examiner, Royce testified that he observed a "wrap-up"[4] in Ruby's dye box and immediately discharged him because

[4] A wrap-up occurs when one strand of goods on a dye box reel loops over another strand so as to double up. This may cause the machine to stall. To remove a wrap-up the goods have to be pulled out of the machine by hand or cut out by knife, a process which may take three or four hours (B.A. 109a, 117a, 124a-125a).

his work had always been unsatisfactory. He also testified that after he discharged Ruby, he saw Miller, as upon several previous occasions, "bunched" up with several other employees engaged in conversation, and thereupon decided to discharge Miller also (B.A. 169a-170a; 119a-120a, 122a-123a).

The record does not show that the wrap-up in Ruby's box on the day of his discharge was due to any culpable negligence on his part (B.A. 219a; 93a-94a, 98a, 119a-120a). Such mishaps were not uncommon even among operators with considerably more experience than Ruby (B.A. 170a, n. 8; 105a-106a, 112a) and the record does not indicate that any employee before Ruby had ever been discharged for having wrap-ups in his dye box (B.A. 219a-220a; 47a-48a).

While Royce testified that he had previously told Miller and other employees whom he had seen in a "huddle" to "break it up" (B.A. 118a), he acknowledged that he had never reprimanded Miller for "not being around" when needed (B.A. 117a). About three weeks before the discharge of Ruby and Miller, Royce had told employee Virgil Fauth, who was Ruby's cousin and had been instrumental in getting a job at the plant for Miller, that both were good employees and that if all his employees were equally satisfactory he would be satisfied with his force (B.A. 218a, 169a, n. 7; 68a, 69a, 70a-71a).

B. *The charges and complaint*—On July 11, 1949, the Union filed charges alleging in substance that petitioner had violated Section 8(a)(1) and

) of the Act by discharging Ruby and Miller and
aiding and abetting the circulation of the anti-
ion petition (B.A. 3a-5a). Thereafter, on Sep-
mber 26, 1949, the Union filed an amended charge
stating the allegations of the original charge and
rther averring that by "other acts and conduct"
titioner had interfered with, restrained and co-
ced employees in the exercise of their rights
B.A. 6a-8a). On June 29, 1950, the General
ounsel of the Board issued a complaint against
titioner alleging in substance that petitioner had
olated Section 8(a)(1) and (3) of the Act by
scharging Ruby and Miller and by threatening
nployees with dismissal because of their interest
, or failure to oppose, the Union, interrogating
nployees concerning their union activities, threat-
ing to cease operating its plant if the employees
lected the Union as their representative, and by
onsoring and encouraging the circulation of the
nti-union petition (B.A. 12a-16a).

C. *The Board's conclusions and order*—Upon
e facts summarized above, the Board found (B.A.
20a-221a) that respondent, in violation of Section
(a)(1) of the Act, restrained and coerced its em-
loyees in the exercise of their rights under the Act
encouraging the circulation of the anti-union
tition in order to ascertain their Union senti-
ents, and threatening employees with discharge
they did not sign it; by threatening to move its
ant if the Union organized the employees; and by
terrogating employees with respect to their union
tivity.

The Board also found (B.A. 217a-220a) that respondent discharged Ruby and Miller not for any alleged inefficiency or misconduct but rather because of their advocacy of the Union, thereby violating Section 8(a)(3) and (1) of the Act.

The Board also rejected petitioner's contention that the complaint should have been dismissed insofar as it alleged violations of the Act not specifically averred in the charges (B.A. 217a).

D. *Proceedings in the court below*—The court below held (R.A. 145a) that the testimony of employees Tate, Fauth, Ruby, and Miller, credited by the Trial Examiner and the Board, adequately supported the Board's unfair labor practice findings. It further held that despite strong evidence to the contrary presented by petitioner it could not say, quoting from *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490, that the Board's decision was "clearly preclude[d] * * * from being justified by a fair estimate of the worth of the testimony of witnesses"; that the evidence supporting the Board's findings of fact appeared "substantial when viewed on the record as a whole"; and that it was bound by these findings although "conceivably we might have arrived at a different result than the Board in the first instance." Accordingly, the court enforced the Board's order (R.A. 145a).

ARGUMENT

1. Petitioner's contention (Pet. 10-19) that the court below misconceived and misapplied the standard of review of Board findings explicated in *Uni-*

versal Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, rests essentially upon the claim that the court improperly acquiesced in the Board's credibility findings. The short answer to this contention is that where, as here, the evidence gives rise to "two fairly conflicting views" a reviewing court should not displace the Board's resolution of the conflict with its own "even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera,* 340 U.S. at p. 488. The court below could not "conscientiously find" that the record "preclude[d] the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses" (*Universal Camera,* 340 U.S. at pp. 488, 490) and, accordingly, correctly concluded that the Board's findings were supported by substantial evidence on the record as a whole. The decision thus comports with the requirements of *Universal Camera.*

Petitioner's related claim that the decision below is in conflict with the views of the Court of Appeals for the Second Circuit as expressed in *National Labor Relations Board* v. *Universal Camera Corp.,* 190 F. 2d 429, overlooks more recent decisions of that court. Although there is an apparent suggestion in the cited case that a reviewing court is free to resolve credibility and decide *de novo* all contested issues of fact other than those involving the Board's specialized knowledge, subsequent decisions of that court make it clear that both the Second Circuit and the court below are in agreement

with this Court that Board findings of fact should not be disturbed unless a fair estimate of the record as a whole clearly precludes such findings, even though the court might justifiably have reached a different conclusion on a *de novo* appraisal of the record. *National Labor Relations Board* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494; *National Labor Relations Board* v. *Smith Victory Corp.*, 190 F. 2d 56, 57-58; *National Labor Relations Board* v. *Montgomery Ward & Co.*, 192 F. 2d 160, 163; *National Labor Relations Board* v. *Krimm Lumber Co.*, 203 F. 2d 194, 196; *National Labor Relations Board* v. *Radio Officers' Union*, 196 F. 2d 960, 962, certiorari granted on another point, 344 U.S. 852.

2. Petitioner's contention (Pet. 21-22) that the complaint is defective, insofar as it alleged violations of Section 8(a)(1) of the Act not specifically averred in the charge, lacks merit. The amended charge (*supra*, p. 7) timely alleged, in relevant part, that petitioner by the specific acts averred therein and by "other acts and conduct" had violated Section 8(a)(1) of the Act. The relevant allegations of the complaint found by the Board and the court below to be supported by the record (*supra*, p. 8), i.e., that petitioner in violation of Section 8(a)(1) had threatened employees with discharge because of their union activity or interest, interrogated them concerning such activity and threatened to close down its plant if the employees selected the Union as their bargaining representatives, are merely particularizations of the aver-

ments of the charge. There is therefore "a legally sufficient relationship between the subject matter of the charge and the allegations of the complaint" which adequately supports the complaint. *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C.A. 3).[5]

3. Finally, petitioner's assertion (Pet. 22-23) that its encouragement of the circulation of the anti-union petition was privileged under Section 8(c) of the Act presents no issue warranting review by this Court. As the court below (R.A. 145a), upholding the Board's findings (B.A. 220a), correctly concluded, petitioner seized upon the petition as a vehicle for interrogating its employees as to their attitude towards the Union and threatened employees for failure to sign it. In this context and in the light of petitioner's other coercive practices, such interrogation plainly does not constitute an expression of views, opinion, or argument privileged by Section 8(c), but rather interference and restraint prohibited by Section 8(a)(1) of the Act. E.g., *National Labor Relations Board* v. *Wytheville Knitting Co.*, 175 F. 2d 238, 239 (C.A. 3); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 740 (C.A. D.C.),

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[5] Accord: *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14-16 (C.A. 1); *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2); *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C.A. 5); *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737 (C.A. 5); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C.A. 7); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C.A. 10).

certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C.A. 2); *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 832 (C.A. 7), certiorari denied, 339 U.S. 963.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which applica-

tion may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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